

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

LAURA C. ROBINSON,
Appellant,

DOCKET NUMBER
PH-0731-10-0333-I-4

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: January 30, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Laura C. Robinson, Harrisburg, Pennsylvania, pro se.

Joyce B. Harris-Touunkara, Esquire, and Robert Girouard, Esquire,
Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

FINAL ORDER

The Office of Personnel Management (OPM) has filed a petition for review of the initial decision that reversed its directive to remove the appellant from her position with the Department of Defense, Defense Logistics Agency (DOD-DLA),

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

and its decisions to cancel her eligibility for reinstatement to her current position and any other positions, and to debar her from competing for any covered position in the federal service for 3 years. Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed.² See Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)). After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision issued by the administrative judge, which is now the Board's final decision. [5 C.F.R. § 1201.113\(b\)](#).

On review, OPM does not challenge the administrative judge's finding that it failed to prove that the appellant intended to defraud, deceive, or mislead DOD-DLA regarding her employment history with the U.S. Postal Service (USPS). Moreover, the record evidence and the applicable law support the administrative judge's thorough, explained, and well-reasoned findings that: (1) the Board has jurisdiction over this appeal under chapter 75, applying *Aguzie v. Office of Personnel Management*, [116 M.S.P.R. 64](#) (2011); and (2) OPM failed to present sufficient evidence to rebut the appellant's persuasive evidence that she did not

² Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

intend to defraud, deceive, or mislead DOD-DLA regarding her employment history with USPS when she submitted an erroneous OF-306. *See* Initial Decision; *Scheffler v. Department of the Army*, [117 M.S.P.R. 499](#), ¶ 4 (2012). Consequently, we discern no reason to disturb the administrative judge's finding that OPM failed to prove its charge and his decision to reverse OPM's actions and directives. *See Crosby v. U.S. Postal Service*, [74 M.S.P.R. 98](#), 106 (1997) (finding no reason to disturb the administrative judge's findings where the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions); *Broughton v. Department of Health and Human Services*, [33 M.S.P.R. 357](#), 359 (1987) (same).

On review, OPM merely reasserts its opposition to the Board's decision in *Aguzie*. More specifically, it alleges that the administrative judge erred in adjudicating the appeal as an adverse action appeal under 5 U.S.C. chapter 75, subchapter II, instead of as a suitability action under [5 C.F.R. § 731.501](#), that *Aguzie* should be overruled, and that the administrative judge erred in ordering as interim relief that DOD-DLA, a non-party, reinstate the appellant. Petition for Review (PFR) File, Tab 3 at 2-16. These arguments were made in OPM's petitions for review in *Hopper v. Office of Personnel Management*, MSPB Docket No. CH-0731-09-0798-I-3, and *Turo v. Office of Personnel Management*, MSPB Docket No. CH-0731-09-0850-I-4. The Board has already thoroughly addressed each of the aforementioned arguments in *Hopper v. Office of Personnel Management*, [118 M.S.P.R. 608](#), ¶¶ 8-11 (2012). For the reasons set forth in *Hopper*, we decline to disturb the *Aguzie* decision and to review the reasonableness of OPM's suitability regulations.

Regarding OPM's assertion that it was error for the administrative judge to order, as interim relief, a nonparty to reinstate the appellant, we do not reach this issue here because: (1) OPM demonstrated that it and the agency complied with the interim relief order; (2) the appellant did not object to the interim relief ordered; and (3) in ordering relief, we follow the language set forth in *Scott v.*

Office of Personnel Management, [116 M.S.P.R. 356](#), ¶¶ 19-22, (2011), *aff'd as modified on recons.*, [117 M.S.P.R. 467](#) (2012), concerning the various obligations of OPM and the employing agency. *See* PFR File, Tab 3 at 17-18.

ORDER

We ORDER OPM to cancel its decision letter of March 3, 2010, and to direct the employing agency to retroactively restore the appellant effective March 5, 2010.³ *See Kerr v. National Endowment for the Arts*, [726 F.2d 730](#) (Fed. Cir. 1984). OPM must complete this action no later than 20 days after the date of this decision.

We also ORDER OPM to direct the employing agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Back Pay Act no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith with the employing agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information requested by the employing agency to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the employing agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER OPM and the employing agency to tell the appellant promptly in writing when they believe they have fully carried out the Board's Order and of the actions they took to carry out the Board's Order. The appellant, if not notified, should ask OPM and the employing agency about their progress. *See* [5 C.F.R. § 1201.181\(b\)](#).

³ If the cancellation of OPM's decision letter does not automatically cancel the additional actions OPM took, we ORDER OPM to restore the appellant's eligibility for positions in the competitive service and to cancel the debarment.

No later than 30 days after OPM and the employing agency tell the appellant that they have fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal to resolve any disputed compliance issues. The petition should contain specific reasons why the appellant believes that OPM and/or the employing agency have not fully carried out the Board's Order, and should include the dates and results of any communications with OPM and/or the employing agency. [5 C.F.R. § 1201.182\(a\)](#).

For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The employing agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

**NOTICE TO THE APPELLANT REGARDING
YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS**

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202, and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date of this order. See [5 U.S.C. § 7703](#)(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. See *Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and [Forms](#) 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.



DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT
CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
 - a. Outside earnings with copies of W2's or statement from employer.
 - b. Statement that employee was ready, willing and able to work during the period.
 - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
 - a. Employee name and social security number.
 - b. Detailed explanation of request.
 - c. Valid agency accounting.
 - d. Authorized signature (Table 63)
 - e. If interest is to be included.
 - f. Check mailing address.
 - g. Indicate if case is prior to conversion. Computations must be attached.
 - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.